IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

HAZEL MAXINE COLN and husband CARL F. COLN,	)	
Plaintiffs/Appellees,	)	**Hardin Circuit No. 2081**
VS.	)	**Appeal No. 02A01-9507-CV-00152**
CITY OF SAVANNAH, TENNESSEE,	)	
Defendant/Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF HARDIN COUNTY
AT SAVANNAH, TENNESSEE
THE HONORABLE JULIAN P. GUINN, JUDGE

JAMES A. HOPPER
Savannah, Tennessee
Attorney for Appellant

EDWARD L. MARTINDALE, JR.
DREW & MARTINDALE, P.C.
Jackson, Tennessee
Attorney for Appellees

REVERSED

ALAN E. HIGHERS, J.

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

HOLLY KIRBY LILLARD, J.

This appeal involves a suit filed by plaintiffs, Hazel Maxine Coln and Carl F. Coln, against the City of Savannah, Tennessee ("the city"), for personal injuries sustained when Mrs. Coln tripped and fell on a city sidewalk. The trial court ruled in favor of plaintiffs and apportioned negligence at 70% to the city and 30% to Mrs. Coln. The city has appealed and has presented the following issues for our consideration: (1) whether the trial court erred in finding that sidewalk was in a defective or dangerous condition, thereby causing governmental immunity to be removed; and (2) whether the trial court erred in failing to find that Mrs. Coln was more than 50% negligent. We find the city's contentions to be well-taken; therefore, we reverse the judgment of the trial court.

During the summer of 1992, the city contracted with a landscaping service to install decorative brick pavers in front of City Hall in Savannah, Tennessee. The work consisted of removing shrubbery and flowers, filling the area with sand, and placing brick pavers on top of the sand. After the brick pavers were installed, there existed a slight deviation between the brick pavers and the sidewalk.

On November 2, 1992, Mrs. Coln, age 68, tripped over this raised portion of the sidewalk and fell. As a result, she fractured her left wrist.

William Gilchrist, the landscape designer that installed the brick pavers, testified that at the time of installation, there was a deviation that measured approximately three-eighths of an inch between the pavers and the sidewalk. He attributed this deviation to the settling of the sand beneath the pavers and the existence of a hump in the concrete sidewalk. According to Gilchrist, some deviation between the pavers and the adjacent material was common. Gilchrist told Bill Fox, assistant manager for the city, about the existence of the deviation, but Mr. Fox did not request that it be corrected. Mr. Fox admitted that he was aware of an approximate one-fourth inch deviation between the sidewalk and the pavers, but he felt that the slight deviation was acceptable.

Paul Lebovitz , a landscape architect, testified that brick pavers are accepted in the

industry as safe pedestrian sidewalk material. He testified that when pavers are installed adjacent to sidewalk concrete, it is reasonable to expect some deviation between the two surfaces.

Following a hearing, the trial court found that the condition of the sidewalk was defective, unsafe, and dangerous, and, therefore, governmental immunity was removed. The trial judge further stated:

> They [the city] surprisingly knew of it [the deviation] in its inception, but accepted it and made no attempt to correct it....They created and maintained the defective, unsafe and dangerous condition and that this condition was the proximate cause of the injuries suffered or experience by the Plaintiff wife.

The trial judge apportioned negligence at 30% to the plaintiff and 70% to the city. When plaintiff's attorney asked the judge about the basis for his finding of 30% negligence on the part of the plaintiff, the judge responded, "I think the lady should have looked. I think she should have seen what was there to have been seen."

The city argues on appeal that the evidence preponderates against the trial court's determination that the sidewalk was in a defective, unsafe, or dangerous condition. Furthermore, the city contends, the trial court should have found the plaintiff to have been more than 50% negligent because the condition of the sidewalk was open and obvious.

Our review of the trial court's finding of facts is governed by T.R.A.P. 13(d), which directs us to review the case *de novo* upon the record, accompanied by a presumption of correctness, unless the evidence preponderates otherwise.

We will first address plaintiff's contention regarding the apportionment of fault, as we find such issue to be dispositive of this appeal. Thus, the question that we must resolve is whether the fault attributable to plaintiff was equal to or greater than the fault attributable to the defendant. Eaton v. McLain, 891 S.W.2d 587 (Tenn. 1994). If so, then the plaintiff is precluded from recovery. McIntyre v. Balentine, 833 S.W.2d 52 (1992). In Eaton, 891

S.W.2d at 592, our Supreme Court set forth the following nonexhaustive list of pertinent factors to evaluate in assigning percentages of fault to each party:

> (1) the relative closeness of the causal relationship between the conduct of the defendant and the injury to the plaintiff; (2) the reasonableness of the party's conduct in confronting a risk, such as whether the party knew of the risk, or should have known of it; (3) the extent to which the defendant failed to reasonably utilize an existing opportunity to avoid the injury to the plaintiff; (4) the existence of a sudden emergency requiring a hasty decision; (5) the significance of what the party was attempting to accomplish by the conduct, such as an attempt to save another's life; and (6) the party's particular capacities, such as age, maturity, training, education, and so forth.

Id. at 592.

In attempting to determine whether the evidence preponderates against the trial court's apportionment of fault, we find the recent decision of Broyles v. City of Knoxville, No. 03A01-9505-CV-00166, 1995 WL 511904 (Tenn. App. August 30, 1995), to be particularly instructive in this case, as it contains facts virtually identical to the case *sub judice*.

In Broyles, the plaintiff tripped and fell over a short section of the sidewalk that was "substantially and very visibly" raised up above the rest of the sidewalk. Id. at *2. The condition of the sidewalk was obvious, and there was nothing obstructing the plaintiff's vision. Id. The court relied on Cooperwood v. Kroger Food Stores, Inc., No. 02A01-9308-CV-00182, 1994 WL 725217 (Tenn. App. Dec. 30, 1994), and its analysis of the open and obvious rule, in holding that "the conclusion is inescapable that plaintiff was fifty percent (50%) or more at fault." Id. at *5.

In Cooperwood, No. 02A01-9308-CV-00182, 1994 WL 725217 (Tenn. App. Dec. 30, 1994), this court stated the open and obvious rule as follows:

> The open and obvious rule is one whereby an invitee can be barred from recovery for injuries resulting from a danger as
>
> readily apparent to the invitee as to the owner or operator, as the latter would have no knowledge of the danger superior to that of the invitee.

Id. at *3.

The court in Cooperwood recognized that prior to Tennessee's adoption of comparative fault, the open and obvious rule operated to alleviate any duty owed to a plaintiff who suffers injury as a result of conditions that are open and obvious. However, the court held that since McIntyre and its adoption of comparative fault principles, the open and obvious rule is no longer the law in Tennessee. Id. at *3. Instead, the court held:

> [W]hen an invitee is injured because of dangers that are obvious, reasonably apparent, or as well known to the injured party as to the owner or operator of the premises, liability, if any, should be determined in accordance with the principles of comparative fault....

Id.

The eastern section of this court in Broyles agreed with Cooperwood's conclusion that the open and obvious rule as it previously existed was abrogated by the adoption of comparative fault. Id. at *4. The Broyles court noted, however, that the underlying principles of the open and obvious rule remain viable. The court stated its perception of the current status of the doctrine as follows:

> We adhere to the concept that there is no liability on the person or entity in control of premises if a person lawfully thereon fails to exercise reasonable care for his or her own safety or for dangers that are obvious, reasonably apparent, or as well known to the injured party as to the owner, operator or person in control of the premises, so long as the plaintiff's negligence is equal to or greater than the defendant's negligence....Otherwise stated, we are of the opinion that the duty of the plaintiff has not been changed but plaintiff's failure to meet her duty must be compared to the negligence of the tortfeasor or tortfeasors.

Id. at *4.

Because the raised portion of the sidewalk was obvious and because there was nothing preventing the plaintiff from recognizing the danger it presented, the court in Broyles affirmed the trial court in holding that plaintiff was at least 50% negligent, thereby barring her from recovery. Id. at *5.

In the present case, Mrs. Coln testified as follows:

> Q. Now, let's talk for a minute if we could, Mrs. Coln, about the accident that occurred in November of '92. Do you remember that?
> A. Right.
> Q. And what type of day was it?
> A. It was a beautiful day, sunny.
> Q. Had it been raining at all that day?
> A. No.
> * * * *
> Q. What type of shoes were you wearing that day?
> A. Rough sole shoes. Just a flat shoe.
> Q. Were you carrying anything in your hands?
> A. No. I had my purse on my shoulder.
> * * * *
> Q. Do you wear glasses?
> A. I wear contacts.
> Q. Did you have your contacts in that day?
> A. Yes, I did.
> Q. Did you have any problem at all between the time you parked your car and the time that you tripped and fell? Did you have any problem at all with your walk?
> A. No, I didn't.
> * * * *
> Q. Well, you knew it [the brick pavers] was a different material, didn't you, than a sidewalk?
> A. Yes.
> Q. And you had your head down and you were looking where you were going?
> A. Right.
> Q. You had on flat shoes?
> A. Right.
> Q. The weather was clear?
> A. Right.
> * * * *
> Q. And is there any reason if you were looking down as you say and the weather was clear and the thing in your hand wasn't bothering you you could not see the difference between the brick...going to the concrete?
> * * * *
> A. No.

In light of the foregoing evidence and the court's decision in Broyles, we conclude that the evidence preponderates in favor of a finding that Mrs. Coln was at least 50% negligent. As in Broyles, the record in the case at bar reveals that the condition of the sidewalk was obvious to the extent that a reasonably prudent person should have recognized the potential hazard that it presented. We agree with the observation of counsel for the city that "there is a certain amount of care that the Good Lord intended for all of us to take in regard to where we plant our feet, for the world is not flat."

Our resolution of the foregoing issue pretermits all other issues raised by the parties on appeal.

Accordingly, the judgment of the court below is reversed. Costs on appeal are adjudged against plaintiffs, for which execution may issue if necessary.

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HIGHERS, J.

CONCUR:

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CRAWFORD, P.J., W.S.

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LILLARD, J.